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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1290

GREAT WESTERN BROADCASTING CORPORATION
d/b/a KXTV, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May, 1966.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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This brief is filed with the consent of the parties pursuant to Rule 42 of this Court.

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters (hereinafter called the Association) is a non-profit organization of radio and television broadcasters whose membership included as of May 4, 1966, 2228 AM stations,

1004 FM stations, 483 Television stations, and all of the nationwide radio and television networks. This brief is submitted in furtherance of the objective of the Association which, in accordance with its by-laws,

> ". . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustice and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

REASONS FOR GRANTING THE WRIT

In the area of labor-management relations, the secondary boycott is of prime concern to broadcasters. The secondary boycott restrains and coerces broadcast stations through unfair economic pressure and seriously impairs their ability to pursue their legitimate business interests. Frequently, the economic injury suffered from a secondary boycott is far more lasting than the effects of a primary labor dispute. Thus, the decision of the 9th U. S. Circuit Court of Appeals is of vital importance to the entire broadcast industry.

The Association has supported over the years numerous Congressional efforts to enact remedial boycott legislation and endorsed the enactment of the present secondary boycott sections of the Labor Management Relations Act of 1947, as amended in 1959 (hereinafter called the "Act").[1] It is the basic belief of the Association that Congress has intentionally and effectively proscribed all secondary boycotts of the nature here involved. The publicity proviso to Section 8(b)

[1] 61 Stat. 140, as amended in 1959, 73 Stat. 525, 29 U.S.C. 158.

(4) while having been interpreted as exempting certain otherwise prohibited union activities as against secondary employers, applies only to those activities which physically contribute to the production of a product for the market—as does transportation of the product, or distributing, or wholesaling.

A broadcast station contributes no service in the production of products being distributed by its advertisers at any time from inception to the final distributional point to the customer. A broadcast station does not handle or otherwise work on the products being so distributed. The advertising services furnished by television, or radio, stations contribute not to the production of the advertised articles, but to the production of customers for them after they become a product.

In its decision (356 F. 2d 434) the Court below said at page 436:

> "The Supreme Court has said that the publicity proviso is to be given as broad an application as the statutory prohibition. It follows that, whatever difficulties an analytical dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is amended."

It is the Association's position that the Court of Appeals has gone far beyond any guidelines set forth by this Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, or *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, and has given the proviso a much greater scope than that intended by Congress or this Court.

In both *Servette* and *Tree Fruits* there were tangible products capable of distribution. The primary dispute in both instances was with the distributor of that

product. The product which is a primary aspect of the dispute can be followed. On the other hand, where a primary employer provides only a service, not directly handling the product, there is nothing to be followed. The actual performance of the service is the only primary aspect involved, and this cannot be "distributed" by another employer. *Servette* and *Tree Fruits* confine the exemption of the proviso to 8(b)(4) of the Act to situations involving secondary boycotts where there is a forward flow of a product from the primary employer to the secondary employers.

When an advertiser engages the services of broadcast stations, there is no flow of product from the station to the advertiser. At this point there is no station product. Therefore, any coercive publicity directed against an advertiser who uses the services of a broadcast station which has a primary dispute with a union to require him to stop doing business with the broadcast station, is a prohibited secondary boycott in its purest form as spelled out in Section 8(b)(4) of the Act.

If there are products of a broadcaster which would satisfy the requirements of the Act, they are the programs put together and broadcast over his station's facilities and not the products *advertised* over those facilities.

The product of a radio and television station is not unlike that of other advertising media such as newspapers and magazines. A program is the result of the physical efforts of the employees of a broadcasting company in the same way that newspapers and magazines are products of the companies who produce them.

However, a radio or television station differs in one very important respect from other advertising media.

Radio and television stations, because of the peculiar nature of the air waves with which they operate, could not be allowed to develop helter-skelter solely on the basis of free enterprise. Congress determined at an early date that stations would first have to secure a license from a regulatory body established for that purpose to insure the orderly development of nationwide communications.[2] The primary concern today of the Federal Communications Commission in granting a license to applicants is the way in which the applicant intends to operate in the "public interest, convenience, and necessity."[3]

The courts have, on numerous occasions, been called upon to determine the scope of the FCC's authority to define what is in the public interest. In each instance, it is evident that an important factor in that determination is the programming policy of each individual station. In comparative hearings involving two or more applicants for the same facility, the Federal Communications Commission cannot prescribe any type of programs, but it can and does make a comparison on the basis of public interest, and, therefore, public service. In *Johnston Broadcasting Company* v. *Federal Communications Commission,* 175 F. 2d 351, the Court said at page 359: "But in a comparative consideration, it is well recognized that comparative service is the vital element, *and programs are the essence of that service.*"[4] (emphasis added).

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[2] 48 Stat. 1081, 47 U.S.C. 301.

[3] 48 Stat. 1083, as amended in 1962, 76 Stat. 58, 47 U.S.C. 307(a).

[4] See also: *National Broadcasting Co.* v. *United States,* 1943, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 1940, 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 84 L.Ed. 656.

It can thus be seen that the FCC recognizes the program to be the essential element of public interest and, therefore, the reason why radio and television stations are allowed exclusive use of a particular frequency within a specific, prescribed area. It can be said then that broadcast stations provide the public with an essential product, the program.

Another recognition of the program as the product of a broadcaster is found in the Communications Act itself. Section 325(a) provides in part: ". . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."[5]

The Congressional intent to preserve the property rights of the broadcasters was clearly spelled out in the enactment of Section 325(a). It recognized without equivocation the rights of a radio station in its programming. This is apparent from the following statement made by Senator Clarence C. Dill during floor debate on Section 28 of H.R. 9971:[6]

> "As to Section 28, providing that no person, firm, or corporation shall rebroadcast the material broadcast by a station without the station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting, it could be picked up and broadcast from the other stations. . ."[7]

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[5] 48 Stat. 1091, 47 U.S.C. 325(a).

[6] Section 28 of H.R. 9971 was enacted as Section 28 of the Radio Act of 1927 and ultimately re-enacted as Section 325(a) of the Communications Act of 1934.

[7] 68 Cong. Rec. 2880 (1927).

The authors of the Radio Act of 1927 then, by providing protection for the program of one broadcaster as against unauthorized use by another broadcaster, were acknowledging the program as the product of a broadcaster's labor.

A radio or television station prepares and distributes over its facilities programs identifiable as to content and length. Many stations spend great amounts of time and money to secure the right personnel who possess the special qualities needed to provide a unique service to the public. The programs, then, made up by co-ordinating the efforts of many individuals such as technicians, administrative personnel, directors, and performers, result in a product which is unique from all others.

This product, like a newspaper, is distributed to the public. A consumers' boycott of a radio or television program might be accomplished by direct appeal to the public informing it of the labor dispute and urging its assistance by not listening to the programs of the station in question.

That advertising was not to be, in and of itself, the primary object of broadcasting was emphasized early in the era of radio regulation:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefits as is derived by advertisers must be incidental and entirely secondary to the interest of the public . . . advertising should be only incidental to some real service rendered to the public, *and not the main object of a program.*"[8] (Emphasis added).

[8] 2 Fed Radio Commission Ann. Rep. 168 (1928).

Thus the advertising message of a sponsor is only an ingredient of the broadcaster's product. In other words, the program is the product and advertising is merely an element thereof. The proviso here in question applies only to the end product, the program, going forward and may not be applied backwards to reach the elements of the product. To apply the proviso to a boycott of the advertisers in this situation would be as erroneous as applying it to a boycott of a wheat mill where the primary dispute was with the manufacturer of a cake mix which utilizes the raw flour of the wheat mill in its cake mix.

In the case at issue, the advertisers were not the people handling or distributing KXTV's products, the programs; therefore, the proviso would not protect the unions' activity. The Court below went too far in interpreting the prior decisions of this Court and thus, the instant case provides an excellent opportunity for clarification. To allow this decision to stand would have the effect of foreclosing any future opportunity for the Court to consider this important issue.

CONCLUSION

For the foregoing reasons, the petition of Great Western Broadcasting Corporation for a writ of certiorari should be granted.

Respectfully submitted,

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